

Answering Macron

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Emmanuel Macron wrote me a letter. (You too, by the way; if you haven't read it yet, you'll find it [here](#).) It is very urgent what he has to tell me. It has to do with Europe, with the EP elections in May. What does he want from me?

He wants me to know that "never Europe has been in so much danger" and that the "future of our continent" is at stake and that "time is of the essence". He wants to shake me up. He wants me to be scared and angry and upset. About what? About the "lie and the irresponsibility", about the "rejection without an alternative", about the "manipulations" of the "anger mongers", who, "backed by fake news, promise anything and everything – about "nationalist retrenchment".

Furthermore he wants me to approve of his European political "ambitions", which are "freedom, protection and progress". He lists a number of ideas, like preventing Putin from manipulating our democracy, banning hate speech throughout the EU, regulating platforms and much more, including institutional matters: a "European Council for Internal Security" to supervise a Europeanized external border protection and asylum system, a "European Security Council" including post-brexite UK. And at the end, for the implementation "with an open mind, even to amending the treaties", a "Conference for Europe" including "citizens' panels" and "academics, business and labour representatives, and religious and spiritual leaders".

He wants not just my approval, he also wants me to make a "choice". He wants me to "decide". After all, we are in the middle of an election campaign. He wants us, him and me, to "chart together the road to European renewal".

Suppose I want to do as he asks: yes, I think Farage and Orbán and Salvini are bad and his three ambitions are, by and large, great. Yes, I want to chart that European renewal road with him. That's just a metaphor, of course. What choice exactly does he want me to make? If I decided to vote for him in the European elections – I can't. He and his ambitions are not on my ballot paper. So what exactly should I do? What does he want from me?

This time it's different

The current European election campaign feels different from the previous ones. This time, it seems, the election is really *about* something. The dispute is falling into shape like iron filing in an electromagnetic field, polarized by a binary alternative: Do we want this or the opposite? A or -A? That A is about migration and openness, and its opposite is about isolation and nationalism, it's all a bit blurry and fuzzy, of course, but then, the "freedom vs. socialism" thing wasn't exactly razor-sharp either, was it? To compensate for that, the polarization takes the face of concrete persons who

compete for leadership. Do we want him? Or him? Do we want Macron? Or do we want Orbán?

+++++A Note from EURAC+++++

Call for Applications: *The University of Innsbruck in cooperation with Eurac Research [invites applications for two PhD positions in Political Science](#), for a period of 3 years ([here](#) and [here](#)). The doctoral student will be enrolled at the University of Innsbruck and will be based both at Eurac Research (Bozen/Bolzano – Italy) and at the University of Innsbruck and participates in the doctoral programme there.*

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The power of this polarization is currently felt in the European People's Party. Its EP group leader, a gentleman named Manfred Weber, is struggling to make his face known as a candidate for the office of EU Commission President. The choice between him to get the job and Frans Timmermans, Ska Keller or whatever the other so-called "*spitzenkandidaten*" are named, seems to be a rather hard sell in terms of mobilizing voters, apart from the most devoted EU policy wonks. The one issue that might actually have some traction with the electorate is the fact that Weber has been cuddling with his fellow EPP member and dear friend and ally Viktor Orbán for many years, proving a staggering degree of indifference towards his many democratic shortcomings. Other than that, Weber would just be another Brussels face among many, wouldn't he?

A Commission President by Orbán's grace, however? That might mobilize quite a lot of people, and rightly so. Before that background, ousting Fidesz from the EPP has gained a lot of momentum recently, and on 20 March the EPP will decide if Orbán will be booted out. This was triggered neither by Orbán's undeniable authoritarianism nor by the the blatant anti-semitism of his election campaign, but by the fact that his posters demonise, besides George Soros, also dear old Jean-Claude Juncker. His own Commission President from his own EPP! Even a stomach as robust as Mr Weber's can't digest that sort of behaviour if he, as a "*spitzenkandidat*" claiming this very office on the basis of the strength of his party, wants to preserve any residual credibility at all.

A constitutional and not a political conflict

Interestingly, however, Orbán seems not to give much of a damn about the consternation he causes in the EPP. On the contrary, one might almost think he wants to be expelled by the "useful idiots" in his party to clarify the fronts. He seems to want to be able to stage himself as a cool and rational statesman at the same time, though, which is probably why a Fidesz-submissive Hungarian newspaper was chosen to articulate the call for a rupture with the EPP. Meanwhile, Orbán's spokesman tells Weber off by [twittering](#) that "stopping migration" is more important than party discipline. As to Macron, he gets, the day after his letter, [accused](#) to be a "pro-immigration politician" who "is going after those who are against immigration", in "whose opinion, the ads of immigration opponents should be banned" which would

be "[censorship](#)" and "impermissible and unacceptable". Immigration, Immigration, Immigration! As far as EU reform is concerned, the same spokesman on the same day [welcomed](#) Macron's initiative as "a good start to a serious and constructive dialogue on the future of Europe", for which it is "high time".

Orbán obviously wants to lock horns with Macron at all costs in this election, and he absolutely wants it to be a conflict over migration policy. He wants it to be a political conflict. A matter to be decided in terms of majority over minority.

But it's not. This is not a political conflict. It is a constitutional conflict.

Orbán wants us to believe that he argues with his opponents about migration policy, when in fact the conflict is about Article 2 TEU. It is about the rule of law, democracy and human rights.

Constitutional conflicts should never be fought out at the ballot box. There are good reasons why most modern constitutional systems require supermajorities in order to amend the constitution. The power to do so is not conferred on the election winner who has won a majority over the competing minority. He should not be able to change the political rules of the game over the head of the defeated competitor.

Constitutional politics must follow special procedural rules that are distinct from those of ordinary politics, otherwise the constitution would be subject to the power it legitimises and be caught in a paradoxical loop. The fact that the difference between both has been nonexistent since 2010 in Fidesz two-thirds majority Hungary, thanks to a uniquely bizarre electoral system, was how the whole misery begun. In Hungary, the majority was able to tailor the entire constitution to suit its own needs on the basis of its electoral victory, without involving the opposition at all. Orbán has systematically turned constitutional politics into politics. That's what he does. That's what he is good at.

Okay now, Monsieur le Président. I still owe you an answer. To be honest – don't be mad at me, but I would be much more comfortable if we could have this EP election about some boring old policy issues and not about the "future of our continent". You suggest a number of policies yourself on which I'd have a lot of questions and an urgent need for controversy. But I wouldn't want this election to be a plebiscite about the EU's fundamental values, to be honest. Not because I am not with you on this, or because I don't see the urgency of reforms in the EU, but because I am generally of the opinion that fundamental values should not be a matter of majority and minority. (Maybe that is a very German point to make, but a well justified one, I think.) It is the logic of the Orbáns, Kaczyńskis and Salvinis, that the constitution and its institutions must bow to the will of the electoral victor. A logic which we shouldn't accept for ourselves, don't you think?

Constitutional judges in Luxembourg

In **Poland**, the erosion of liberal constitutional democracy has now progressed so far that prominent government critics such as Wojciech Sadurski and Adam Bodnar

face lawsuits now. This has given [ARMIN VON BOGDANDY](#) and [LUKE DIMITRIOS SPIEKER](#) an idea that is as innovative as it is explosive: national judges, before adjudicating on such cases, should be obliged under European law to refer them to the European Court of Justice in Luxembourg.

In **Hungary**, the Constitutional Court, long ago neutralized by Orbán, has meanwhile decided that the so-called "Stop Soros Act", which penalizes helping refugees and threatens NGOs, is constitutionally flawless in all respects, but in the reading of [VIKTOR KAZAI](#) it has at least ensured that it must be interpreted and applied in a somewhat restrictive manner.

Speaking of Luxembourg: Last week the **European** Court of Justice, largely unnoticed, has carried out a revolution in EU law, which should make the already perked-up ears of the Karlsruhe judges glow red with anger. Few would have thought that the CJEU judges would be entitled to declare a legal act of a member state not only contrary to EU law, but also null and void. They are, however, or believe to be. [DANIEL SARMIENTO](#), to his credit, has noticed and written a poignant analysis.

Namibia has been restituted two objects stolen in **German** colonial times, which makes [JOCHEN VON BERNSTORFF](#) and [JAKOB SCHULER](#) think about who is actually entitled to restitution under international law: the modern state or the tribe affected at the time?

In **Kosovo**, the transitional justice structures set up at the instigation of the Council of Europe to investigate the crimes committed during and after the 1998/99 war are causing plenty of problems, described by [LEKË BATALLI](#).

The **German** Home Office wants police officers to wear "bodycams", not to protect citizens from transgression but to protect the police from false accusations. [HARTMUT ADEN](#) and [JAN FÄHRMANN](#) consider this to be contrary to the rule of law.

Our [online symposium on EU citizenship](#) is already closed, but [DORA KOSTAKOPOULOU](#)'s "Eurozenship" thesis has stirred so much debate that she has now delivered a rejoinder to her critics.

Alexander Thiele's contribution from last week on the opposition's norm control motion against the **German** law against advertising for abortion meets with objection from [ROMAN KAISER](#), who defends abstract norm control against Thiele's criticism.

Elsewhere

[MATHILDE LAPORTE](#) is sceptical about the constitution of **Florida's** peculiarity to stipulate a constitutional revision every 20 years.

[JONATHAN FRANCO](#) sees the upcoming parliamentary elections in **Israel** as the possible beginning of a new era.

[MARGARITA BONET ESTEVA](#) explains why the **Spanish** Constitutional Court did not set free the two Catalan independentist leaders Jordi Cuixart and Jordi Sánchez from pre-trial detention.

[ANA MARÍA CARMONA CONTRERAS](#) examines the possibilities for the outgoing **Spanish** PM Sánchez to govern by emergency decrees .

[JUAN RAMIREZ](#) reports on the veto threat of **Colombian** President Duque against the establishment of a special court as part of the peace process with the FARC ex-guerrillas.

[ALONSO GURMENDI](#) draws our attention to an arbitration case between a Canadian company and **Venezuela** in which Venezuelan lawyers have now turn against incumbent President Maduro and declared themselves loyal to interim President Guaidó.

[SRINIVAS BURRA](#) examines the hostilities between **India** and **Pakistan** from an international law perspective.

That's it for this week. All best, and take care

Max Steinbeis

